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NO. ____

IN THE
Supreme Court of the United States

MARILYN ARONS, RUTH WATSON, AND PARENT INFORMATION CENTER OF NEW JERSEY, INC.,
Petitioners,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF DELAWARE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Delaware

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners Marilyn Arons and Ruth Watson are non-lawyers who assist parents at administrative hearings held under the Individuals with Disabilities Education Act ("IDEA"). IDEA accords parents "the right to be accompanied and advised" by counsel or "by individuals with special knowledge or training with respect to children with disabilities." 20 U.S.C. 1415(h)(1). The Supreme Court of Delaware found that petitioners had engaged in the unauthorized practice of law ("UPL") by providing such assistance. The questions presented are:

1. Does IDEA's guarantee that parents may be accompanied and advised by "individuals with special knowledge or training with respect to children with disabilities" entitle parents to have non-lawyer advocates appear on their behalf at IDEA hearings, as the Department of Education, the agency charged with administering IDEA, has consistently held for twenty years?

2. Does IDEA impliedly preempt Delaware's UPL rules where, as here, the Department of Education has concluded that application of those rules to bar lay representation in IDEA hearings would "unquestionably subvert" the Act's core goal of empowering parents to challenge adverse school board decisions?

PARTIES TO THIS PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The petitioners in this case are Marilyn Arons, Ruth Watson, and the Parent Information Center of New Jersey, Inc., a non-profit organization with which Ms. Arons and Ms. Watson are affiliated. The respondent is the Office of Disciplinary Counsel of the Supreme Court of the State of Delaware. The United States filed a brief *amicus curiae* in the Delaware Supreme Court supporting respondents and setting forth the views of the United States Department of Education, the agency charged with administering the Act. The one corporation involved in the case, the Parents Information Center of New Jersey, Inc., is a non-profit corporation with no shareholders, no stock, and no parent or subsidiary corporations.

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PETITION FOR A WRIT OF CERTIORARI

Marilyn Arons, Ruth Watson and the Parents Information Center of New Jersey, Inc. ("Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Delaware in this case.

OPINION BELOW

The opinion of the Supreme Court of Delaware is reported at 756 A.2d 867 (Del. 2000) and is set forth in the Appendix ("App.") at 1A-15A. The Findings and Recommended Disposition of the Board on the Unauthorized Practice of Law of the Delaware Supreme Court is unreported and is set forth at App. 16A-42A.

JURISDICTION

The judgment of the Supreme Court of Delaware was entered on July 6, 2000. This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV.

The pertinent provision of the Individuals with Disabilities Education Act, 20 U.S.C. 1415 ("IDEA"), provides:

Procedural safeguards ***

(h) Safeguards. Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded--

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions * * *.

STATEMENT OF THE CASE

The unauthorized practice of law ("UPL") proceedings giving rise to this Petition were an outgrowth of five IDEA hearings conducted by the Delaware Department of Public Instruction in which Ms. Arons and Ms. Watson appeared on behalf of parents. Ms. Arons and Ms. Watson are, respectively, the founder and the Executive Director of the Parents Information Center of New Jersey, Inc., a non-profit organization established in 1977 to provide advice, counseling and advocacy services to families of children with disabilities. Because the hearings that Ms. Arons and Ms. Watson handled were held pursuant to IDEA, and because Petitioners' argument is based in large measure on the preemptive reach of IDEA, we start with an overview of IDEA's structure and purpose. We then recount the proceedings before the Board on Unauthorized Practice of Law and the Delaware Supreme Court.

A. IDEA.

IDEA was enacted in response to Congress' longstanding concern that "more than half of the children with disabilities in the United States do not receive appropriate services." 20 U.S.C. 1400(b)(3); *see also Honig v. Doe*, 484 U.S. 305, 309-12 (1984); *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982). Congress' goal in IDEA was to "assure that all children with disabilities have available to them . . . a free appropriate public education" and to protect the rights of children with disabilities and their parents or guardians. 20 U.S.C. 1400(c). Accordingly, Congress devised a system of funding for special education and evaluative procedures, 20 U.S.C. 1411, and required States and localities that accept such funding to implement a plan for providing special education, identifying children who need special educational assistance, and determining what assistance each child needs. 20 U.S.C. 1412-1414. Delaware participates in and receives federal funds under IDEA. App. A44 (¶5).

At IDEA's heart are the procedural safeguards that States and localities are required to accord "children with disabilities and their parents" to assure "the provision of a free and public education." 20 U.S.C. 1415(a). To determine the unique needs of each disabled child, IDEA requires the preparation of an "individualized educational plan" ("IEP") that sets performance goals for the child and objective criteria and evaluation procedures for determining whether the child is progressing at a proper rate. 20 U.S.C. 1414. Written prior notice to parents is required whenever a school either "proposes to initiate or change" or "refuses to initiate or change" the "identification, evaluation, placement, or provision of special educational services for the child." 20 U.S.C. 1415(b)(3). This notice must be fully informative, and parents must have an opportunity to present complaints about the IEP. 20 U.S.C.

1415(b)(3)-(7). When complaints are forthcoming, "the parents shall have an opportunity for an impartial due process hearing," which is typically provided by the local educational unit, 20 U.S.C. 1415(f), and for an impartial review on appeal to a State educational agency. 20 U.S.C. 1415(g).

At due process hearings held under IDEA, any party "shall be accorded" the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1). At least since 1981, the Department of Education has consistently taken the position that this provision authorizes non-lawyer representation at IDEA hearings, and indeed has threatened to initiate proceedings to withdraw federal funding from states that fail to permit non-lawyer representation. Brief for the United States, *In re Arons*, No. 440, Del. Sup. Ct. (Dec. 1, 1999) at 33-34 (hereinafter "U.S. Amicus Br.").

In Delaware, due process hearings are conducted by the Department of Public Instruction. App. A45-A46 (¶8). These are formal, adversarial, adjudicatory hearings held before a three-member panel appointed by the Department of Public Instruction. *Id.* Parents play no role in the selection of panel members. *Id.* The panels consist of an attorney (who is always the chair), an educator (generally a professor of special education or a related field at a Delaware college or university), and a lay person. *Id.* The parties consist of parents, who are not generally represented by lawyers; the local school board, which is always represented by counsel; and the Department of Public Instruction, which generally is also represented by counsel. *Id.* (¶11). Because due process hearings involve complex factual questions relating to the unique learning needs of the disabled child, the hearings often last several days. *Id.* The hearings begin with opening statements from each party.

Id. at A47 (¶13). Evidence is then presented through the testimony of witnesses, who are subject to direct and cross-examination. *Id.* Although the rules of evidence do not strictly apply, the Chair rules on legal issues, the qualifications of experts, and objections to relevance, materiality, and admissibility. *Id.* (¶¶12-13). Following the presentation of evidence, the parties make closing statements and then submit post-hearing briefs and memoranda. *Id.*[1]

B. Proceedings Before The Board On The Unauthorized Practice Of Law.

On August 8, 1996, respondent Office of Disciplinary Counsel ("ODC"), an arm of the Delaware Supreme Court, filed a charge with the Board on the Unauthorized Practice of Law of the Supreme Court of Delaware ("Board") alleging that petitioners had violated Delaware's UPL rules by representing families of children with disabilities in five IDEA hearings. Ms. Arons and Ms. Watson acknowledged that they had, in fact, represented these parents, but denied that their activities constituted the *unauthorized* practice of law because IDEA explicitly authorizes representation by non-lawyer experts. Petitioners pointed out as well that every other state permits lay representation of parents in IDEA proceedings and that the United States Department of Education, the agency charged with administering IDEA, has long held the position that the Act authorizes non-lawyer advocacy. Because the pivotal issue was a legal one — namely, whether IDEA authorizes non-lawyer representation — the parties agreed that they would

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[1] Parents who do not prevail in the administrative process have the right to seek judicial review. 20 U.S.C. 1415(i)(2). Ms. Arons and Ms. Watson do not claim a right to represent parents in court proceedings.

submit a Stipulation of Facts to the Board in lieu of a formal hearing. App. A43 (Stipulation); A54 (Amendments to Stipulation).

The Stipulation establishes a number of facts relevant to this Petition. To begin with, the charges brought against Ms. Arons and Ms. Watson were not made by dissatisfied clients who were duped by imposters masquerading as lawyers. Rather, the charges were initiated by the school boards — the parents' opponents in these hearings. App. A43-A44 (¶2). The parents sought out Ms. Arons' and Ms. Watson's assistance, this assistance was provided free-of-charge, the parents were advised at the outset that they were not lawyers, and the parents "believe that their position was effectively presented in the due process hearings." *Id.* at A51 (¶¶29-32). Each of the parents had sought to obtain counsel but had been unable to find any lawyer to assist them on a fee-for-service, reduced cost, or *pro bono* basis. *Id.* at A50 (¶21). Nor is there any dispute that, but for Ms. Arons' and Ms. Watson's assistance, the parents would have foregone their statutory right to contest decisions by the school board. *Id.* at A50-A51 (¶27-28). As the parties stipulated, the parents would have done so, not because their claims lacked merit, but because (1) they "were intimidated by the formality and complexity of due process hearings," (2) they did not have "grounding in the technical issues that lay at the core of their disputes with the local school boards to enable them to handle the hearings *pro se*," and (3) the hearings "placed them in an adversary posture against two instrumentalities of government, each represented by lawyers." *Id.*

Finally, there is no question that non-lawyers like Ms. Arons and Ms. Watson are competent to advocate effectively on behalf of families with disabled children. To be effective, an advocate at an IDEA hearing must be familiar with the

clinical aspects of the child's condition (skills that lawyers ordinarily lack), as well as the rules governing the conduct of the hearing. *Id.* at A47-A48 (¶14). Non-lawyers with "special knowledge and training with respect to the problems of children with disabilities" are fully capable of presenting the parents' case to the panel. Indeed, Ms. Arons and Ms. Watson obtained significant relief in each of the five cases at issue here, even though they were matched against members of the Delaware Bar. *Id.* at A52 (¶33); *see also id.* at A56 (¶6)

After reviewing the stipulated record and detailed briefs, and hearing argument from counsel, the Board issued its Findings and Recommended Disposition. *In re Arons,* No. UPL-4, 1996 (App. 16). The Board began by rejecting Petitioners' argument that IDEA entitles lay advocates to represent parents in IDEA proceedings. The Board reasoned that the statutory "accompany and advise" language falls short of an authorization to non-lawyers to actually "represent" parents in due process hearings. *Id.* at A27-A29. In so ruling, the Board refused to defer to a 1981 opinion letter issued by the Department of Education because it disagreed with the Department's legal analysis. *Id.* at A31-A36. In light of its reading of the Act, the Board rejected Petitioners' preemption analysis, concluding that IDEA did not "override Delaware's regulatory authority" over the unauthorized practice of law. *Id.* at A36. The Board left unaddressed Petitioners' contention that enforcing Delaware's UPL rules to bar non-lawyer advocacy would frustrate IDEA's goal of enabling parents to challenge school board decisions that were adverse to their children. The Board recommended that the Delaware Supreme Court direct

Ms. Arons and Ms. Watson to cease "the unauthorized practice of law in the State of Delaware." *Id.* at A42.[2]

C. Proceedings Before The Delaware Supreme Court.

After Petitioners filed their appeal to the Delaware Supreme Court, the United States sought, and was granted, leave to appear as an *amicus curiae*. Its brief explained that its "[p]articipation in this case is particularly important since it involves a fundamental issue relating to the purpose of the Act, as well as the procedural protections the Act guarantees parents of children with disabilities. The assistance of informed lay persons for parents without counsel is critical to parents' ability to protect fully their children's right to an education guaranteed by IDEA." U.S. Amicus Br. at 1-2.

The Delaware Supreme Court affirmed. Petitioners' main argument, joined by the United States, was that IDEA entitles non-lawyers "with special knowledge or training" to advocate on behalf of parents because: (1) section 1415(h)(1) uses the same language to authorize lay experts as to authorize attorneys to act on behalf of parties at due process hearings; and (2) forbidding lay representation at IDEA hearings would lead to an absurd result — namely that parents, who have the right to question witnesses and present evidence at hearings, would simply serve as conduits for the expert's questions and evidence, leading to a time-consuming and cumbersome charade. Petitioners and the United States also emphasized that, if there were any questions about the clarity of the Act, the

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[2] All of Petitioners' federal statutory and constitutional arguments were timely raised before the Board and were properly preserved before the Delaware Supreme Court.

court should defer to the consistently-held position of the Department of Education that the Act authorizes non-lawyer representation. And finally, Petitioners urged that permitting Delaware to invoke its UPL rules in the context of IDEA due process hearings would threaten the Fourteenth Amendment guarantees of due process and equal protection, a threat which the Act should be construed to avoid.

The court rejected these arguments. Initially, it found IDEA's language "ambiguous to the extent it appears to confer joint authority on lawyers and non-lawyers to accompany and advise parents." App. at A6. Resolving this ambiguity in ODC's favor, the court relied mainly on *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 48 (3d Cir. 1988), which held that non-lawyer advocates may not seek attorney's fees under IDEA and, in *dicta*, suggested that IDEA does not authorize non-lawyer representation in due process hearings. *Id.* at A6-A8. The court also reasoned that a passage in the IDEA's legislative history lent strength to the conclusion that IDEA's drafters envisioned different roles for lawyers and non-lawyer experts in IDEA hearings, with lawyers serving traditional representational functions and experts rendering advice. *Id.* And the court refused to defer to the Department of Education's reading of the Act, both because it was set out in an opinion letter, not a regulation, and because it found the Department's analysis unpersuasive. *Id.* at A9-A10.

The court next rejected Petitioners' argument that the Act should be read to permit lay representation in IDEA hearings to avoid running afoul of the due process and equal protection guarantees of the Fourteenth Amendment. *Id.* at A11-A14. The court agreed that the interests at stake were "substantial," and that its ruling would result in some parents forfeiting "their statutory right to contest changes to their child's education plan because they cannot afford legal counsel

and will opt not to proceed *pro se* due to the complexity of the hearings and the prospect of facing two sets of government lawyers." *Id.* at A13. Nonetheless, the court concluded that Delaware's interest in the regulation of the practice of law "significantly outweighs any potential benefit that some individual parents and children may obtain through the services of lay advocates." *Id.*

Petitioners' final line of argument, also supported by the United States, was that the doctrine of implied preemption prohibited the application of Delaware's UPL rules to bar non-lawyer experts from representing parents in IDEA due process hearings. Based on its expertise in the administration of the Act, the United States argued that enforcement of Delaware's UPL rules would thwart the fulfillment of the important federal objectives embodied in IDEA, and thus State law had to yield. The Delaware Supreme Court did not address this argument.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted because the decision below egregiously misreads a pivotal provision of IDEA — the provision that safeguards the right of parents to contest adverse school board decisions. IDEA is an important federal statute on which tens of thousands of parents depend to ensure that their disabled children receive an appropriate education, and the provision at issue here is integral to IDEA's effective operation. That is not only Petitioners' view; it is the position of the United States Department of Education.

Nonetheless, according to the court below, nothing in IDEA limits the ability of any state to enforce its UPL rules in a manner that forces parents either to handle IDEA due process hearings *pro se* or to forfeit their rights to a hearing altogether. That reading (1) conflicts with IDEA's plain language, which

says that parents may be accompanied *both* by lawyers and by non-lawyer experts and makes no distinction between the functions lawyers and non-lawyers experts may perform; (2) disregards the Department of Education's judgment that IDEA authorizes lay representation; and (3) raises intractable due process and equal protection problems because it allows a state — which has a substantial financial stake in the outcome of IDEA due process hearings — to stack the deck decisively in its favor.

Compounding its error, the court below turned a deaf ear to the argument that depriving parents of non-lawyer representation subverts IDEA's core goal of empowering parents to challenge school decisions denying their child an educational opportunity. Without an advocate to take on their cause, parents will abandon their statutory right to contest adverse decisions by school authorities. Who can blame them? In Delaware, due process hearings are complex, formal, and highly adversarial, and parents of modest means and limited education cannot be expected to willingly take on two sets of government-paid lawyers. Despite this Court's admonition in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) that the agency responsible for implementing a statute "is uniquely qualified to determine whether a particular form of state law" frustrates federal objectives, the court below failed to heed the Department's warning and left the issue unaddressed. Because the ruling below frustrates a core goal of IDEA, review by this Court is warranted.

A. IDEA Guarantees Parents The Right To Have Non-Lawyers Advocate On Their Behalf In Due Process Hearings.

1. At the heart of IDEA are the procedural safeguards that enable parents to participate in the development of an

educational program appropriate to the needs of their disabled children. *See* 20 U.S.C. 1415(h). Pivotal among these safeguards is the right to file a "complaint" and have an "impartial due process hearing" if parents are dissatisfied with "any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate education" for their child. *See Board of Educ. v. Rowley,* 458 U.S. 176, 182-83, 204-205 (1982); 20 U.S.C. 1415(b)(6) and (f).

The key to this case is the meaning of subsection 1415(h)(1), and "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE, Sylvania, Inc.,* 447 U.S. 102, 108 (1980). The language of IDEA could hardly be clearer. Section 1415(h)(1) gives parties the "right to be accompanied and advised" not only by counsel but also "by individuals with special knowledge and training." The Act draws no distinction between the two, treating lawyers and specialized lay advocates exactly the same. The next provision of the Act, subsection 1415(h)(2), says that parties have "the right to present evidence and confront, cross examine, and compel the attendance of witnesses." These rights are conferred on *parties,* not their counsel or representatives, which underscores that the Act makes no distinction between lawyers and lay representatives or limits the activities of the latter. Lawyers may take on the duties authorized by section 1415(h)(2) because their clients are "accompanied and advised" by them under section 1415(h)(1). Because that is the case, then, by dint of the same operative language, lay advocates who possess special knowledge and training may undertake the same duties. No other plausible conclusion can be drawn from this provision.

2. Petitioners' reading of IDEA is confirmed by the Department of Education. Twenty years ago, after 1415(h)(1)

was added by the 1975 amendments to the Act, the State of Washington asked for a "legal analysis regarding the role of lay advocates in educational agency administrative hearings" conducted under IDEA. *Letter of Theodore Sky, Acting General Counsel, Department of Education, to the Honorable Frank B. Brouillet, State of Washington*, at 1 (April 8, 1981). The State maintained that the Act's language suggested that non-lawyers were not in fact authorized to engage in activities that are conventionally thought of as legal representation, such as examining and cross-examining witnesses. The Acting General Counsel of the Department of Education rejected this reading of the Act in a detailed opinion letter, concluding that "lay advocates are permitted to represent parties at [IDEA] administrative hearings and appeals." *Id.* at 4.[3]

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[3] The Department of Education has consistently interpreted the Act to permit non-lawyer representation. *See, e.g., Request of Eig*, EHLR [1987 Transfer Binder] 211:270, Supp. 57 (CCR); *Virginia Department of Education*, EHLR [1987 Transfer Binder] 257:349, Supp. 84 (CCR). The Department's position is also reflected in its IDEA regulations, which require public agencies, when giving notice to parents of due process hearings, to inform parents "of any free or low-cost legal *and other relevant services* available in the area." 34 C.F.R. 300.506(c) (emphasis added). The Department's interpretation also accords with that of the academic community. *E.g.*, Rapp, EDUCATION LAW, § 4-10.03[20][iv] at 10-568-69 (Matthew Bender & Co. 1998); Note, *Enforcing the Right to "Appropriate Education": The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103, 1111-12 n.56 (1979). And the Department's construction is consistent with the case law on this issue. *Z.A. v. San Bruno Park Sch. Dist.*, 165 F.3d 1273, 1276 (9th Cir. 1999) (recognizing that lawyer not admitted to California bar "could

The Department gave three reasons for its conclusion. First, it noted that it is "clear from the statutory language alone that Congress contemplated that lay advocates, as well as attorneys, be permitted to play a role at such hearings, and did not distinguish between lawyers and lay advocates in defining that role." *Id.* Second, the legislative history of section 1415(h)(1) fortified the conclusion that Congress sought to authorize lay representation. Finally, at the time section 1415(h)(1) was enacted, Congress had routinely authorized the use of lay advocates in administrative proceedings under federal law, even when the hearings were conducted by State or local authorities pursuant to programs as diverse as social security, veterans' benefits, and food stamps. *Id.* at 6. Because the use of lay advocates had become "commonplace," the Department concluded that there was "no reason to believe that Congress intended to restrict representation at [IDEA] hearings and appeals to attorneys, rather than allowing for the widest possible advocacy," especially since there is "no requirement that the hearing officers conducting such proceedings be attorneys." *Id.* at 8 & n.6. As a result of the Department's ruling in this regard, for twenty years every state in the nation permitted non-lawyer representation in IDEA due process hearings.

Nonetheless, the Supreme Court of Delaware rejected the Department's reading of IDEA, concluding that the Act was ambiguous and that it owed only "modest" deference to the

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appear as a lay advocate" at IDEA hearing but could not recover attorney's fees); *Woods v. New Jersey Dep't of Educ.*, 858 F. Supp. 51, 55 (D.N.J. 1993) (attorney-client privilege attaches to communications between lay advocate and parent during IDEA hearings because "substance of [the] relationship is one of an attorney and client").

Department of Education. App. at A11. The court was wrong on both counts.

a. As to the court's conclusion that IDEA is ambiguous, nowhere does the court offer a plausible alternative interpretation of section 1415(h)(1). ODC had contended that the Act should be read to permit lawyers only to provide representation in due process hearings, because of their inherent and presumptive representational authority. But that reading of the Act renders most of section 1415(h)(1) surplusage and places the Delaware Supreme Court's reading of section 1415(h)(1) in tension with the Ninth Circuit's ruling in *Z.A. v. San Bruno Park Sch. Dist.*, 165 F.3d 1273, 1276 (1999), which recognized that a lawyer not admitted to California "could appear as a lay advocate" at an IDEA hearing but could not recover attorneys' fees.

The court's reading of the Act also leads to an absurd result. The Act indisputably confers on parents the right to advocate on behalf of their children at due process hearings, regardless of legal training, because they are "parties." *E.g., Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3d Cir. 1998). The Act also accords special status to individuals with expertise in the needs of disabled children and gives parents the right to be accompanied and advised by such individuals. It would be "illogical" and "absurd" to "presume that Congress would deny that [representational] function to the persons 'with special knowledge or training' that Congress designated to assist these parents." U.S. Amicus Br. at 20. It would be equally illogical for Congress to have thought that a statute was required to permit a parent to bring to a due process hearing an expert whose only function was to quietly advise the parent. Indeed, the Delaware Supreme Court's construction leads to the conclusion that non-lawyer experts may tell parents what questions to ask, what arguments to make, what evidence to

introduce, and otherwise orchestrate the parents' case, so long as they remain silent and act only through the parent. Nowhere does the court explain why Congress would have ordained such a cumbersome and bizarre process. Because the court's construction of the Act collides with the canon that statutes be read to avoid "odd" or "absurd" results, *Public Citizen v. Department of Justice,* 491 U.S. 440, 454 (1989); *Green v. Brock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989), it warrants review by this Court.

b. Equally troubling is the Delaware court's refusal to give anything but "modest" deference to the Department of Education's interpretation of the Act. The court first justifies its decision by labeling the Department's action "informal" and deprecating the Department's regulatory responsibilities under the Act. App. at A11-A12. But these suggestions are wrong, and overlook the Department's special role in IDEA's drafting and fine-tuning, *see, e.g., Honig,* 484 U.S. at 311-12; the Department's day-to-day responsibility for IDEA's implementation and enforcement, *see, e.g., id.*. at 311; *Cedar Rapids Comm. Sch. Dist. v. Garrett F.,* 119 S. Ct. 992, 998 (1999); and the Department's considered judgment that non-lawyer representation is crucial for the fair and effective administration of the Act. The Act in fact contemplates a central administrative role for the Department, authorizing it to issue "rules and regulations," 20 U.S.C. 1402(a), administer "programs and activities" to implement the Act's mandates, *id.* 1417(b), and supervise the states' compliance with various IDEA requirements. *Id.* 1411-1413, 1420; *Honig,* 484 U.S. at 310. For these reasons, this Court has always looked to the Department for guidance in cases challenging the adequacy of a state's, or a local school board's, compliance with IDEA. *See, e.g., Garrett F.*, 119 S. Ct. at 997-98 n.6; *Irving Indep. Sch. Dist. v. Tatro,* 468 U.S. 883, 891-92 & n.9 (1984).

The court's suggestion that the principles of deference this Court has developed in cases like *Chevron, USA v. NRDC,* 467 U.S. 837 (1984), and *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512-13 (1994), do not fully apply because the Department's views were set forth in an opinion letter and an *amicus curiae* brief, instead of a regulation, is also off base. This Court has said time and again that courts must enforce an agency's consistently-held construction of a statute it administers unless it is demonstrably unreasonable, even where the agency's interpretation is set forth in informal statements like opinion letters, guidance documents, and even *amicus* briefs. *See, e.g., National Fed'n of Fed. Employees v. Department of Interior,* 526 U.S. 86, 99-100 (1999); *Auer v. Robbins,* 519 U.S. 452, 462-63 (1997); *Gardebring v. Jenkins,* 485 U.S. 415, 429-30 (1988). The Department's comprehensive and consistent statements — in a detailed, nine-page opinion letter, a number of administrative orders, and a thirty-five page *amicus* brief — easily satisfy this Court's reasonableness test.

Finally, the court refused to defer to the Department of Education's interpretation of IDEA because it disagreed with the Department's legal analysis. But the Department has the far better of the argument, and the two reasons cited by the court do not justify its conclusion.

First, the court's heavy reliance on *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988), is misguided. The *only* issue presented in *Arons* was whether a lay advocate, whose authority to represent parents in IDEA proceedings was unchallenged, was entitled to seek attorney's fees for her services. The Third Circuit said no. The Third Circuit's *dicta* suggesting that non-lawyers could not represent parents in IDEA hearings is just that — *dicta*. Had the representation issue been before the court, it would

have been briefed by the parties (it was not), the Department of Education's views would have been presented to the court (they were not), and, consistent with Third Circuit precedent, the court would have accorded substantial deference to the Department's reading of the Act. *See, e.g., Connecticut Gen. Life Ins. v. Commissioner,* 177 F.3d 136, 144 (3d Cir.), *cert. denied,* 120 S. Ct. 496 (1999); *Elizabeth Blackwell Health Ctr. for Women v. Knoll,* 61 F.3d 170, 183 & n.9 (3d Cir. 1995). But the question of deference did not arise.

Second, the court cited one sentence from the Senate Conference Report that said that in IDEA hearings a party is entitled to "the right to counsel and to be advised and accompanied by individuals" expert in the problems of handicapped individuals. App. at A8. Based on this statement, the court concluded that "Congress envisioned [a clear distinction] between the representational role of lawyers and the advisory role of non-lawyers." *Id.* This ambiguous snippet from the Committee report does not support the court's conclusion. Not only has this Court repeatedly cautioned against the use of committee reports in interpreting statutory language, *see, e.g., National Fed'n. of Federal Employees,* 526 U.S. at 96; *Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 483-84 (1997), but also reliance on a committee report is especially inappropriate where, as here, there are strong contradictory signals from other legislative materials. *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 609-11 (1991). The crucial "accompany and advise" language in section 1415(h) was written by Representative Miller, who explained the language by reference to then-existing California hearing requirements, which allowed lay experts to advocate on behalf of parents. U.S. Amicus Br. at 32. This history, which speaks directly to the question of lay representation, is far more persuasive than the lone sentence in the Senate Conference Report. But even accepting the court's overstated

characterization of the Report, *Wisconsin Public Intervenor* makes plain that reliance on it here was wholly inappropriate.[4]

The court's cramped and illogical reading of the Act is a textbook example of why courts — including state courts — should defer to expert agencies rather than setting sail on their own interpretative voyage. As the Department's *amicus* brief emphasized, interpreting subsection 1415(h)(1) to permit lay representation serves IDEA's overarching goal of giving parents a say in the educational opportunities available to their disabled child. On the other hand, the court's interpretation of section 1415(h)(1) deals a body blow to the fair and effective enforcement of IDEA by placing due process hearings out of the reach of most parents. U.S. Amicus Br. at 20, 26. The court was wrong to substitute its reading of the Act for that of

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[4] In any event, fairly read, the Senate Reports support Petitioners. The Senate Committee Report simply tracks the statutory language; the Conference Report on which the court relied confirms (1) that hearings rights conferred in section 1415(h) run to parties, not to counsel; (2) that IDEA due process hearings were intended to be informal, with hearings overseen by "impartial" hearing officers who do *not* have to be lawyers or have any legal training (in Delaware two of three panel members are not lawyers); and (3) that Congress recognized that informality was important because parents could not be expected to have the resources to retain counsel, much less hire counsel *and* expert advisors. S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 47-51 (1975) *reprinted in* [1975] USCCAN 1425, 1500-03. None of these observations is consistent with the court's claim that Congress drew a distinction between the functions lawyers and non-lawyer experts may perform in IDEA hearings.

the expert agency, and this Court should grant review and correct the Delaware court's egregious misreading of the Act.

3. The Delaware Supreme Court also erred in brushing aside the serious due process concerns created by its construction of IDEA — concerns that argue in favor of interpreting the Act to permit non-lawyer representation. Petitioners' due process argument was based on the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Petitioners maintained that the interest at stake — a child's fundamental right to an education — is substantial, that the protection of lay representation could be provided to parents without cost to the state, and that, without a capable advocate at IDEA hearings, children run an exceptional risk that they will be denied educational opportunities to which they are legally entitled.

The risk of deprivation is particularly high in IDEA cases because school boards have strong financial incentives to deny costly services to disabled children. *E.g., Garrett F.*, 119 S. Ct. at 999-1000; *Tatro*, 468 U.S. at 892. Because of the stakes, the school board and the state are represented by counsel and can commit resources to the hearing that inevitably dwarf those available to parents. *Cf. Santosky v. Kramer*, 455 U.S. 745, 763 (1982). By denying parents the right to non-lawyer assistance, the ruling below magnifies the disparities between the parties to the point where parents have no reasonable chance of prevailing — no matter how meritorious their claim. No one seriously disputes that a contest between the State and school board, both represented by counsel, on one side, and a *pro se* parent on the other, would be lopsided or, as this Court put it in *Lassiter v. Deparment of Social Servs. of Durham Cty.*, 452 U.S. 18, 27 (1981), "unwholesomely unequal." Consequently, parents who cannot find or afford a lawyer, and are denied lay assistance, will either give up (as the

parents here would have done) or be hopelessly overmatched at the hearing. The guarantees of the Due Process Clause do not permit a state to stack the deck so decisively in its favor. *See Little v. Streater*, 452 U.S. 1, 21-22 (1981). To avoid this entanglement, Petitioners urged that the court apply the settled rule of construction that favors avoidance of constitutional problems. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trade Council*, 458 U.S. 568, 575 (1988).

The Delaware Supreme Court rejected this argument, concluding that the state's interest in regulating the practice of law trumped the interests of families with disabled children in having non-lawyer representation. The court's principal concern was the threat to the public posed by incompetent and unaccountable lay advocates. But this concern is overstated in the IDEA context. The plain text of IDEA sets forth an exacting standard for representation: To represent parents in IDEA proceedings, non-lawyers must demonstrate "special knowledge or training with respect to the problems of disabilities." App. at A47-48 (¶14); *id.* at A55 (¶3); Note, *Right to "Appropriate Education:" The Education for All Handicapped Children Act of 1976*, 92 Harv. L. Rev. 1103, 1152 n.56 (1979). And Delaware may hold lay advocates as accountable as lawyers by conditioning the participation of non-lawyer advocates on their willingness to comply with the Rules of Professional Conduct that bind Delaware lawyers. *See Woods v. New Jersey Dep't of Educ.*, 858 F. Supp. 51 (D.N.J. 1993).

As its final reason, the court expressed skepticism that there was, in fact, a serious and unmet need for lay assistance in Delaware IDEA hearings. In so doing, however, the court reconfigured, or simply disregarded, the evidence. The Stipulation entered into by the parties categorically states that none of the parents involved could find lawyers willing to

handle these cases on *any* basis: fee-for-service, reduced cost, or *pro bono*. App. at 50 (¶21). The *only* non-profit organization in Delaware that provides assistance to parents in IDEA cases, the Delaware Community Legal Aid Society, renders service *only* "on occasion," *only* when the Society's case-load permits the acceptance of new cases, and *only* when the case satisfies "the organization's case acceptance criteria." *Id.* at A55 (¶4). None of these parents met those criteria or asked for help at the right time, and we daresay that the same fate awaits the vast majority of parents in Delaware.[5]

The ruling of the Delaware Supreme Court jeopardizes the due process and equal protection rights of families with disabled children in Delaware — and elsewhere, should other jurisdictions follow Delaware's lead — by forcing them to make the Hobson's choice of handling a hearing *pro se* or forfeiting their right to a due process hearing. Because of the serious constitutional implications of the ruling below, review by this Court is warranted.

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[5] Perhaps as an olive branch, the court holds out the prospect of conducting a rulemaking to authorize non-lawyers to represent parents in IDEA proceedings. App. at A15. At the time of the submission of this Petition, no such proceeding has been commenced. Even were a rulemaking to take place, the right of parents to have lay advocates in IDEA hearings ought not depend on the whim of any particular state or the vagaries of state law.

B. The Ruling Below Is At Odd With Settled Implied Preemption Principles.

This Court has repeatedly held that state law must yield where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1921 (2000) (citations omitted); *Wisconsin Pub. Intervenor*, 501 U.S. at 605 (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This principle compels reversal of the decision below because the court's ruling thwarts perhaps the most basic right accorded to parents under IDEA — the right to challenge through due process hearings adverse determinations affecting their child's educational opportunities. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985); *Honig*, 484 U.S. at 311, 321; *Smith v. Robinson*, 468 U.S. 992, 1011 (1984).

This is not only Petitioners' view, it is the view of the Department of Education. In the brief filed on behalf of the Department below, the United States argued that "barring advocacy by a person 'with special knowledge or training' substantially frustrates a parent's statutory right to have meaningful input at a due process hearing." U.S. Amicus Br. at 26. The United States went on to conclude that "[b]ecause IDEA was intended to ensure the full participation of parents in all educational decisions involving their children, *see Honig*, 484 U.S. at 311, 324, and the Board's [now court's] ruling *unquestionably subverts* a parent's right to challenge such a decision during the mandatory due process hearing, it cannot stand." *Id.* at 27 (emphasis added).[6]

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[6] Should the Court harbor any doubts about the Department's position in this case, we urge that the Court solicit the Department's views before acting on this Petition.

Under this Court's rulings, the courts below were obligated to at least give weight to, if not heed, the Department's warning that barring lay representation would impermissibly obstruct the accomplishment of IDEA's purpose. For example, in *Medtronic,* 518 U.S. at 496, this Court emphasized that, because federal agencies that administer the law are "uniquely qualified to determine whether a particular form of state law" frustrates federal objectives, their views on implied preemption are entitled to considerable weight. Just last Term, the Court reaffirmed that principle in *Geier,* where the Court, in evaluating an implied preemption claim, placed considerable reliance on the views of the Department of Transportation, noting that "the agency's own views should make a difference." 120 S. Ct. at 1926. To borrow from the Court's reasoning in *Geier,* under the IDEA "Congress has delegated to the . . . [Department of Education] authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements. *Medtronic,* 518 U.S. at 496; *see id.* at 506 (Breyer, J., concurring in part and concurring in judgment)." 120 S. Ct. at 1926-27.

Review in this case is warranted because the court below not only failed to take the Department's views into account, it appeared to disregard them altogether. The result is that the fulfillment of an important provision of federal law has been thwarted by the application of inconsistent state law, despite the legion of this Court's cases holding that, under these circumstances, state law, not federal law, must yield.

CONCLUSION

For the reasons stated above, the Petition should be granted.

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